

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35106

**UNITED STATES DEPARTMENT OF ENERGY --
RAIL CONSTRUCTION AND OPERATION --
CALIENTE RAIL LINE IN LINCOLN, NYE, AND ESMERALDA
COUNTIES, NV**

**CSX TRANSPORTATION, INC. RESPONSE TO REPLY OF THE UNITED
STATES DEPARTMENT OF ENERGY TO COMMENTS ON ITS
APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND
NECESSITY**

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CSX Transportation, Inc. ("CSXT") seeks a safety condition under 49 U.S.C. § 10901(c) in this proceeding requiring that rail shipments of Spent Nuclear Fuel ("SNF") tendered to CSXT by, for, under the direction of, with the consent of, or in any other manner on behalf of the U.S. Department of Energy ("DOE") for transportation to Yucca Mountain as the ultimate destination be required to move in trains dedicated exclusively to the carriage of SNF, i.e., dedicated trains. In its August 29, 2008 Reply of the United States Department of Energy to Comments filed on its Application for a Certificate of Public Convenience and Necessity ("DOE Reply"), DOE has opposed the proposed condition, despite its previous commitment to use dedicated trains on the planned new Yucca Mountain Line. This Response addresses several issues raised by DOE's Reply, including (1) DOE's use of an internal document to justify a retreat from its representation to the Board that it would use dedicated trains on the proposed Yucca Mountain

Line and (2) its inaccurate representation that DOE's policy, as expressed in the attachment to its Reply, "largely addresses CSXT's concern" regarding the transportation of SNF in trains other than trains dedicated to such shipments

DOE is in a unique position in this proceeding. While it is proposing the construction of a rail line in Nevada designed primarily for the transportation of SNF, it also substantially if not totally controls the shipment of SNF nationwide. DOE thus will also be responsible for generating the SNF rail traffic from around the United States that will use the Yucca Mountain Line. Acting as a shipper, DOE will route the traffic and decide on the mode of transport and, for rail transport, the type of train services. DOE also will be responsible for the security of the SNF shipments. In short, DOE will be much more than the owner of a line of railroad, but instead it will control the shipment of SNF to that railroad over the lines of other railroads, including CSXT. In these unique circumstances, CSXT has reasonably proposed that the Board impose a safety condition for DOE shipments en route to Yucca Mountain on CSXT lines that would require the same safety practice that DOE said in its Application that it would apply on its own Yucca Mountain Line, namely, the use of dedicated trains for the transport of SNF. Unfortunately, DOE has opposed CSXT's request.

I. Dedicated Train Service on the Yucca Mountain Line

In the DOE Reply, DOE notes that "it has adopted a policy to use dedicated trains as the *usual mode* of rail service for shipment of spent nuclear fuel and high-level radioactive waste to the Yucca Mountain repository. That policy largely addresses CSXT's concern." DOE Reply, at 40 (emphasis added, footnote omitted). As support, DOE attached (at Appendix E) an internal DOE memorandum dated July 6, 2005. *See id.* at 40 n. 125. That memorandum predates DOE's 2005 public Policy Statement favoring the use of dedicated trains. CSXT had assumed that

DOE's Policy Statement and its representations in its Application reflected its view in favor of dedicated trains

Contrary to DOE's assertion about having addressed CSXT's concerns, CSXT is actually more concerned about DOE's intentions after reviewing DOE's Reply. Rather than reaffirming its representation in its Application that it will use dedicated train service, DOE has for the first time submitted a document to the Board which outlines the need to maintain flexibility as to whether or not to use dedicated trains. Specifically, DOE cites as the basis for its ambiguous "usual mode" policy a July 6, 2005 Memorandum from the Director of DOE's Office of National Transportation, Office of Civilian Radioactive Waste Management (OCRWM) to the Principal Deputy Director of OCRWM ("July 2005 Memorandum"). That Memorandum, which requests approval of a policy to use dedicated trains for OCRWM shipments of SNF and high-level radioactive waste (HLW)¹ to Yucca Mountain, was apparently a prelude to the DOE Policy Statement for Use of Dedicated Trains for Waste Shipments to Yucca Mountain. That Policy Statement, which was attached as Appendix A to CSXT's Comments, was issued shortly after the July 2005 Memorandum.

While DOE's Policy Statement is quite affirmative that dedicated trains are a safer, more secure and lower cost method of transportation such that DOE "will use" such train service for its "usual rail transport of spent nuclear fuel," the July 2005 Memorandum on which DOE now purports to rely is considerably more equivocal. For example, regarding the Yucca Mountain service, the July 2005 Memorandum states "OCRWM can expect to benefit from planning on use of DTS [dedicated train service], however, the project must be able to use general freight service and truck as needed. OCRWM should closely follow industry developments, capacity

¹ CSXT assumes that DOE would treat HLW no differently than SNF for transport purposes since these two categories of freight share similar characteristics

forecasts, etc, to ensure DTS remains a cost-effective choice, and should make clear to its stakeholders it retains the option to modify its policy as appropriate ” July 2005 Memorandum, at 4

DOE reliance on the internal July 2005 Memorandum, in contrast to its own subsequent Policy Statement -- and in contrast to the affirmative statements and studies of other agencies detailing the benefits of dedicated trains -- appears to mark a retreat on the agency's commitment to the use of dedicated trains Any such retreat is problematic for several reasons

First, DOE should be held to its representations to the Board in its March 17, 2008 Application for a Certificate of Public Convenience and Necessity (“DOE Application”) There, DOE stated unequivocally that “[s]hipments of spent nuclear fuel and high-level radioactive waste would be made by dedicated trains ” DOE Application, at 15 ² Accordingly, in describing the operations of its proposed rail line, DOE stated “[t]he cask cars would be inspected in accordance with Federal Railroad Administration regulations and then coupled to Caliente Rail Line operated dedicated trains, which would consist of two or three 4,000-horsepower diesel-electric locomotives followed by a buffer car, one to five cask cars followed by another buffer car, and one escort car carrying security personnel ” *Id* at 34 Having made representations in its Application about the use of dedicated trains, DOE should not now be allowed to retreat from those representations See *Railroad Ventures, Inc --Abandonment*

² DOE contemplates that there will be a Staging Yard and Interchange Yard at the point of intersection between the proposed Yucca Mountain Line and the existing UP line In its spare description of the operations of these yards in its Application, DOE does not explicitly state that it intends that it will receive SNF or HLW via dedicated trains from other railroads, but does make the explicit quoted statement about the use of dedicated trains for SNF and HLW shipments Application at 15 There is obviously no rational basis on which DOE could find that dedicated trains are an essential safety/security procedure for the transportation of these commodities through the Nevada desert, but not through populated areas served by other railroads In fact, the opportunity to use safer run-through power to transport such shipments to their destination and limit or avoid yard dwell time and switching is one that DOE should favor

Exemption--Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA, STB Docket No AB-556 (Sub-No 2X), slip op at 6-7 (served Apr 28, 2008) (estopping party from making representation to Board that was inconsistent with what it stated in a prior proceeding)

Moreover, DOE should not be allowed to rely on an internal document to equivocate on its dedicated train service representation in the face of subsequent, more authoritative guidance on the significant safety, security and other benefits of dedicated trains issued by DOE itself, and by other entities expert in the safe transportation of SNF, namely, the National Academy of Sciences, the Federal Railroad Administration and the Nuclear Regulatory Commission. As described at length in CSXT's Comments (at 4-13), the safety and security advantages of dedicated train service have been widely recognized in recent years. DOE itself acknowledged those advantages not only in its Policy Statement, but also in its Draft Rail Alignment EIS regarding the Yucca Mountain Line, which discusses the lower accident and incident rates associated with dedicated trains. See CSXT Comments, at 6-7, Exhibit A, at 1. Similarly, the National Academy of Sciences has extensively discussed the safety and security advantages of dedicated train service and recommended that DOE implement its dedicated train service decision before beginning the large-scale shipment of SNF to Yucca, while FRA and NRC have likewise concluded that there are safety advantages of dedicated trains over general trains. See *id.* at 8-13. In fact, the DOE Reply relies (for an unrelated point) on the same page of an NRC document that CSXT cited in its Comments for the proposition that NRC too recognizes the safety benefits of dedicated trains. See DOE Reply, Appendix C, United States Nuclear Regulatory Commission Policy Issue Information Memorandum, SECY-07-0095, at 5.

The weight of these authoritative expressions on the benefits of dedicated trains, coupled with DOE's own statements in this proceeding, led CSXT to reasonably assume that DOE would readily agree to the requested condition that dedicated trains be used nationwide for the transportation of SNF shipments tendered by it or on its behalf. The fact that DOE has not done so, and that it has offered only an at-best equivocal document on the issue, is troublesome. The STB should be entitled to understand DOE's intentions on this serious safety question. In fact, the Board has a unique opportunity in this proceeding to ensure that SNF and HLW are transported in the safest means possible to Yucca Mountain, not only on the remote Yucca Mountain Line, but through highly populated areas of the East served by CSXT en route to Yucca Mountain.

II. The Board Has the Authority Under 49 U.S.C. § 10901(c) to Condition Approval of the Yucca Mountain Line on a Requirement That All Shipments of SNF Tendered to CSXT be Transported in Dedicated Train Service

In its Comments, CSXT requested that "the Board order, as a condition of approval, that any SNF tendered to CSXT for transportation by rail to Yucca Mountain be transported in trains that are strictly dedicated to the transport of SNF." CSXT Comments, at 13. CSXT argued that because of the direct connection between the approval of the Yucca Mountain Line and the generation of new rail traffic (that would not otherwise move) on CSXT lines destined for Yucca, "there is a clear relation between this proceeding and the safety related condition that CSXT requests." *Id.* at 15. Moreover, the unique posture of DOE as both railroad and shipper further supports the condition sought by CSXT.

The DOE Reply asserts conclusorily that "CSXT's request concerns purported effects outside the Caliente Corridor and is not properly part of the Board's environmental review of the Application." DOE Reply, at 40. In portions of its Reply responsive to other parties, DOE

argues that “the potential environmental impacts of transporting spent nuclear fuel and high-level radioactive waste outside the Caliente Corridor are not properly before the Board” and that since its application only concerns the Yucca Mountain Line “the Board’s environmental review is properly limited to the potential impacts of that line ” *Id* at 26-27 Relying on *Department of Transportation v Public Citizen*, 541 U S 752 (2004) (“*Public Citizen*”), DOE contends that “the potential environmental impacts of national transportation are not a matter the Board has to consider in its analysis of the Caliente Rail Line because responsibility over national transportation rests with DOE As a matter of law, the Board’s actions in this proceeding cannot proximately cause an environmental impact associated with transporting spent nuclear fuel and high-level radioactive waste nationwide Under *Public Citizen* the Board is not required to consider those effects ” *Id* at 27-28

DOE’s contention is wrong both factually and legally But for the Board’s action, trains carrying SNF and HLW will not be transported for DOE’s account on CSXT lines to Yucca Mountain In this proceeding, DOE itself has recognized the national impacts of the proposed line For example, in its Application, DOE indicated that the Yucca Mountain Line would enable “DOE to use a mostly rail scenario for transportation *nationally* . . . ” Application, at 27 (emphasis added) In its Reply, DOE states “the entire Nation will benefit from the Caliente Rail Line ” DOE Reply, at 23 Also, in its Summary for its June 2008 Final Rail Corridor EIS and Final Rail Alignment EIS, DOE states that “[t]he National Transportation Operations Center would oversee the shipment of casks from sites throughout the United States ” This Center would be located at the Rail Equipment Maintenance Yard or Staging Yard on the Yucca Mountain Line See Final Rail Corridor EIS, at S-43

The Final Rail Corridor EIS³, at 1-3 (attached as Exhibit A to this Response), contains a map which shows the locations of all of the commercial and DOE sites that would ship SNF and HLW to Yucca Mountain. Indeed, the very purpose of the Yucca Mountain repository is to serve as a centralized facility for the storage of these uniquely hazardous materials and thus to attract shipments to the facility that would otherwise not be transported. As the Board can see from this map, the vast majority of shipments to Yucca Mountain will come from east of the Mississippi River (including from CSXT's service area). In short, the nationwide shipment-generating impact of allowing DOE to build the Yucca Mountain Line is unmistakable.

Further, operation of the Yucca Mountain Line will turn on how trains are transported to the Line. If SNF shipments are transported to the Yucca Mountain Line in dedicated train service, then DOE's planned Staging and Interchange yards likely will not be engaged in any switching of SNF cask cars as these cars will simply run through the yards, minimizing yard dwell time, and minimizing handling of the cask cars. On the other hand, considerably more yard activity (and thus greater safety/security risks) will be required if the SNF cars are to be switched at the yards from general merchandise trains to dedicated trains.⁴ As the Board well knows, cars in general merchandise trains are switched in many yards as the cars move from origin to destination. SNF cars in general merchandise trains could not be treated differently if they are moved in general merchandise trains. They would be switched and handled at numerous

³ See June 2008 Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada-Nevada Rail Transportation Corridor DOE/EIS-0250F-S2 ("Final Rail Corridor EIS")

⁴ Moreover, DOE does not explain how in the absence of using dedicated trains, it can comply with a Pipeline and Hazardous Materials Safety Administration (PHMSA) regulation which requires that carriers generally move hazardous materials, such as SNF and HLW, out of rail yards within 48 hours of their receipt at the yard. See 49 C.F.R. § 174.14(a).

yards (many in or near highly populated areas) while moving from CSXT origins to the Yucca Mountain Line. Thus, there is a close nexus not only between the Yucca Mountain Line and the new SNF traffic to which CSXT's condition would apply, but also between operation of the proposed line and the proposed condition.

The facts thus show that the condition is related directly to the Yucca Mountain Line and thus appropriate. Similarly, the Board's legal authority to impose the requested condition in the unique circumstances of this proceeding is also beyond question. Under 49 U.S.C. § 10901(c), the Board has authority to impose conditions in rail construction proceedings that it finds are "necessary in the public interest." The Board has exercised such authority to impose a condition supported by the record where, as here, "there is a sufficient nexus between the condition imposed and the transaction before us." *Dakota, Minnesota & Eastern R.R. Corp. – Construction into the Powder River Basin*, STB Finance Docket No. 33407, slip op. at 9 n.20 (served Jan. 30, 2002), *remanded on other grounds, Mid States Coalition for Progress v. STB*, 345 F.3d 520 (8th Cir. 2003).

DOE's reliance on *Public Citizen* to argue against the requested safety condition is misplaced. In that case, the Supreme Court held that "where an agency has no ability to prevent a certain effect, the agency cannot be considered a legally relevant 'cause' of the effect. Hence, under NEPA, the agency need not consider these effects in its EA when determining whether its action is a 'major federal action.'" 541 U.S. at 770. Unlike the limited regulatory role of the Federal Motor Carrier Safety Administration relative to the matters at issue in *Public Citizen*, the Board has broad jurisdiction over the national rail system and can address the broader environmental impacts that, in the special circumstances posed here, will flow from any approval it issues for the DOE Yucca Mountain proposal. What *Public Citizen* makes clear is

that it is appropriate for the Board to consider and address an impact that is the "proximate cause" of the action under consideration. See 541 U.S. at 767. Here, the transportation as to which CSXT seeks a condition -- shipments of SNF en route to the Yucca Mountain Line -- is the direct and proximate result of the approval of the line that DOE seeks to build.

In these circumstances and because of DOE's unique posture, the Board thus has ample authority to impose a condition that both extends beyond the Yucca Mountain Line itself and will impact operations on the Yucca Mountain Line. See also *Riverview Trenton Railroad Company – Petition for Exemption from 49 U.S.C. 10901 to Acquire and Operate a Rail Line in Wayne County, MI*, STB Finance Docket No. 34040, slip op. at 1-2 (EA served Oct. 15, 2001, final order served May 15, 2003) (imposing conditions on intermodal terminal which would not be constructed "but for" STB jurisdiction over rail line proposed to be acquired and operated). As the Board's Section of Environmental Analysis stated in a Draft EIS prepared in another rail construction case, "NEPA requires analysis of an effect where there is a reasonably close causal relationship between the environmental effect and the alleged cause, analogous to the doctrine of proximate cause from tort law."⁵ So here, the Board may impose a special safety condition outside of the EIS process where the condition is designed to address an effect within DOE's control that is the direct, proximate and highly predictable result of any Board action approving construction of the Yucca Mountain Line, i.e., a condition on the rail transportation of DOE shipments to the Yucca Mountain Line that will impact transportation on the Yucca Mountain Line. Since the condition asks for no more than the same safety practice that DOE has stated it will apply on its own line, it should not be controversial.

⁵ See *Southwest Gulf Railroad Company – Construction and Operation Exemption – in Medina County, TX*, Finance Docket No. 34284, slip op. at 1-14 (citing *Public Citizen*, 541 U.S. at 767 in omitted footnote) (Draft EIS served Nov. 5, 2004).

III. Conclusion

CSXT requests that the Board condition any approval of DOE's application on a requirement that the shipment of SNF tendered to CSXT for shipment to Yucca Mountain by or otherwise on behalf of DOE move in dedicated train service. For the reasons stated, the Board should impose such a condition.

Respectfully submitted,



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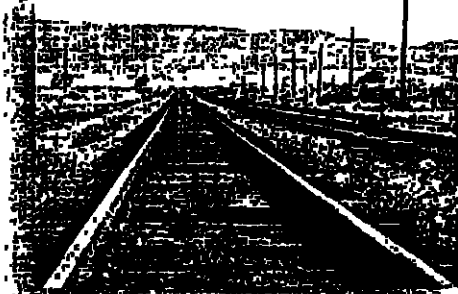
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EXHIBIT A



**Final Supplemental Environmental Impact Statement
for a Geologic Repository for the Disposal of
Spent Nuclear Fuel and High-Level Radioactive Waste
at Yucca Mountain, Nye County, Nevada –
Nevada Rail Transportation Corridor
DOE/EIS-0250F-S2**

and

**Final Environmental Impact Statement
for a Rail Alignment for the
Construction and Operation of a Railroad
in Nevada to a Geologic Repository at
Yucca Mountain, Nye County, Nevada
DOE/EIS-0369**

Volume I

**Nevada Rail Corridor SEIS
Rail Alignment EIS - Chapters 1 and 2**



**U S Department of Energy
Office of Civilian Radioactive Waste Management**

June 2008

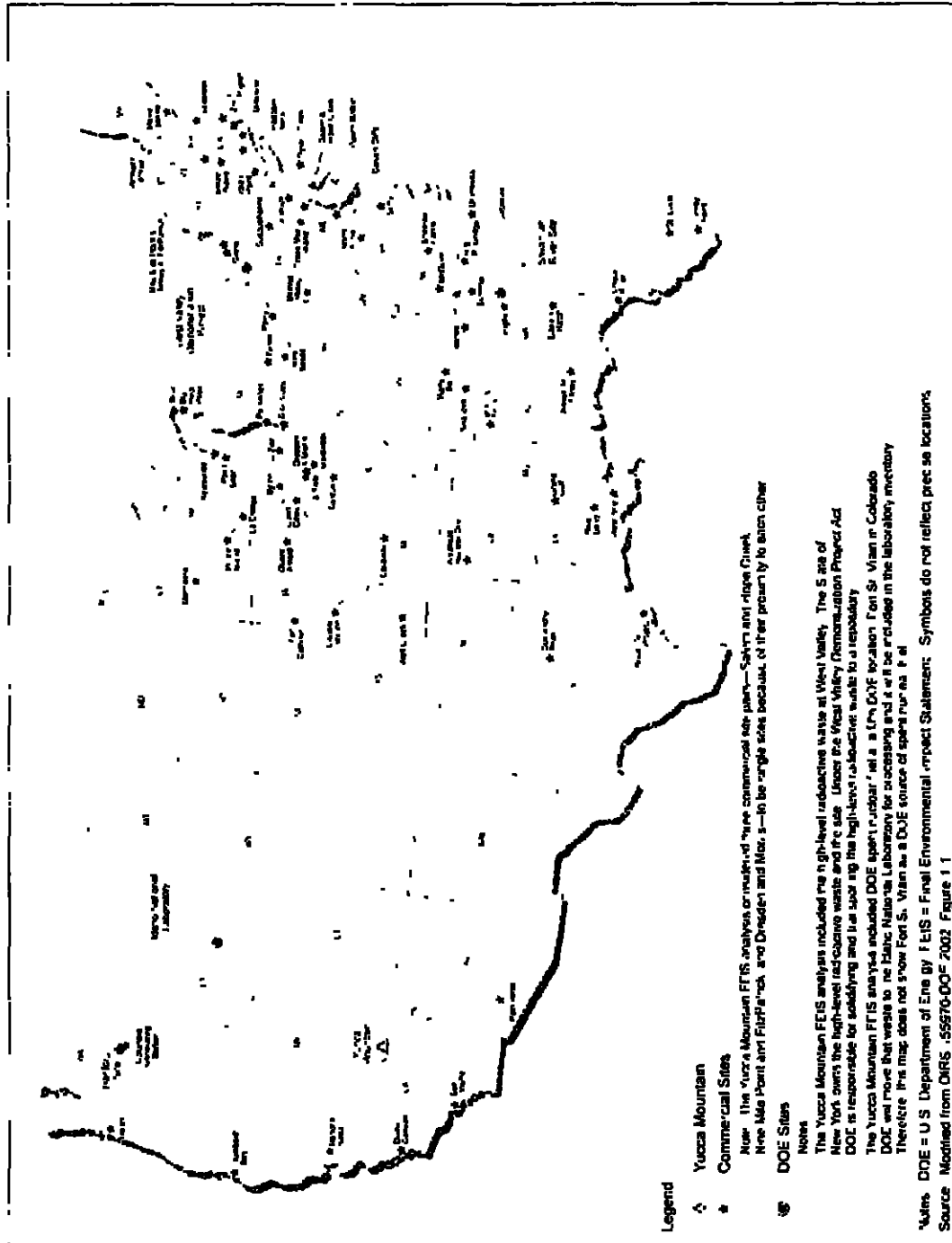
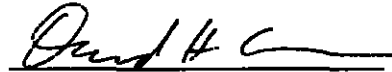


Figure 1-1. Locations of commercial and DOE sites that would ship spent nuclear fuel and high-level radioactive waste to Yucca Mountain

CERTIFICATE OF SERVICE

I hereby certify that I have caused the CSX Transportation, Inc Response to Reply of the United States Department of Energy to Comments on its Application for a Certificate of Public Convenience and Necessity to be served on each Party of Record by first class mail, postage prepaid, on September 18, 2008

A handwritten signature in dark ink, appearing to read "David H. Coburn", is written over a horizontal line.

David H Coburn